

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GLYNDA HENDERSON

Claimant

VS.

RUSSELL STOVER CANDIES

Respondent

AND

HARTFORD ACCIDENT & INDEMNITY

Insurance Carrier

Docket No. 258,498

ORDER

Respondent requested review of the September 20, 2004 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on March 1, 2005.

APPEARANCES

Roger Fincher, of Topeka, Kansas, appeared for the claimant. Brenden Webb, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that although listed by the ALJ as part of the record for purposes of the Review and Modification hearing, the Post-Award Medical Transcript and the deposition of Dr. Kimball Stacey are irrelevant for purposes of this proceeding and need not be reviewed or considered.

ISSUES

The ALJ denied respondent's request for review and modification finding that "[r]espondent has not met its burden".¹ He went on to say that "[a]lthough the [c]ourt suspects the [c]laimant is manipulating the system, suspicion alone is insufficient for the [c]ourt to find the [c]laimant has not made a good faith effort to find employment."²

¹ ALJ (Review and Modification) Award (Sept. 20, 2004) at 3.

² *Id.* at 2.

Accordingly, he refused to impute any sort of post-injury wage to claimant which would have reduced her ultimate work disability as found in the original Award dated December 19, 2002 and modified by the Board's Order dated August 28, 2003.³

The respondent requests review of this decision alleging the ALJ erred in not modifying the Award and imputing a wage to claimant. Respondent's contention is that the ALJ himself found claimant's job search in the months following the issuance of the Award less than compelling and that she has manipulated the system in such a manner that she has no financial incentive to find work.

Respondent requests the Board overturn the ALJ's ruling and find that claimant has failed to demonstrate a good faith effort to secure appropriate employment since she was terminated from respondent's employ. Respondent maintains the claimant is capable of earning between \$6.50 and \$9.00 per hour on a full-time basis. And based upon her pre-injury wage, such wages would constitute a comparable wage and render her ineligible for a work disability under K.S.A. 44-510e(a).

Claimant argues that she has continued to make a good faith effort to find employment since the date of the Regular Hearing and that the ALJ's Review and Modification Order should be affirmed in all respects.

The sole issue to be determined is whether there has been a change in circumstances as it relates to claimant's job search efforts.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The underlying facts are well known to the parties and will not be repeated. Suffice it to say, claimant sustained a compensable injury to her left ankle and right knee on March 28, 2000. She was awarded an 11 percent whole body functional impairment along with a 69.5 percent work disability based, in part, upon a 100 percent wage loss. This Award was affirmed by the Board (although the date the work disability commenced was modified) and ultimately affirmed by the Court of Appeals on April 2, 2004.⁴

³ The Board's Order merely modified the date on which claimant's work disability commenced and affirmed the ALJ's original conclusion that claimant's wage loss was 100%.

⁴ *Henderson v. Russell Stover Candies*, No. 91,217. (Kansas Court of Appeals unpublished opinion filed April 2, 2004).

Respondent filed a request for Review and Modification on June 24, 2004. Respondent contends, as it did at the Regular Hearing, that claimant has failed to continue to make a good faith effort to obtain appropriate employment. It is respondent's belief that, with a good faith effort, claimant could find appropriate post-injury employment that would pay her a comparable wage thus negating respondent's liability for work disability benefits under K.S.A. 44-510e(a).

Other than the evidence considered for the underlying Award, the only additional evidence by the parties bearing on the pending issue is claimant's own testimony offered at the Review and Modification hearing. During those proceedings claimant testified that she had moved to Aurora, Colorado, principally to be near family, but also because the job market was larger and hopefully presented more opportunities than her former location of Abilene, Kansas. Since relocating, claimant testified she became more aggressive in her job search efforts, in part due to the ALJ's admonition in the underlying Award. She testified she was using newspapers, calling, and personally going to businesses in her area, sometimes spending as much as 2-3 hours per day looking for a job, depending on how she feels and the weather. Claimant presented an exhaustive list of businesses at which she sought employment and explained that she believed she had the requisite skills to perform a sedentary job, as long as any potential employer could accommodate her by limiting walking and standing activities to 10 minutes per hour, as well as repetitive hand activities not to exceed 50 times per hour.

The Workers Compensation Act provides that an award can be reviewed and modified for good cause shown and, if the award is determined to be excessive or inadequate, the ALJ may modify the award. The Act's review and modification statute provides:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. . The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.⁵

⁵ K.S.A. 44-528(a).

A modification due to a changed condition cannot be made without comparing claimant's condition at the time of the agreed award with his condition at the time modification is sought.⁶ The Board has recognized that one's employment status, wages and earnings are not static. Change is inevitable. When an award is entered the relevance of the claimant's wage information does not end so long as permanent partial disability benefits are being paid or are payable. In addition, our Courts have held other factors to be relevant to a determination of disability. Such factors include whether a claimant has refused a reasonable job offer and whether a claimant has made a good faith effort to find work.⁷

The burden of proof is on the party seeking review and modification of an award to establish a change in claimant's condition from the time the original award was entered.⁸ Here, respondent and its insurance carrier have the burden of proving a change of circumstances such that a modification is warranted. Furthermore, when a employer contests a worker's continuing good faith efforts to find appropriate employment, the employer has the burden of proof as that term is defined by K.S.A. 44-508(g).⁹

The ALJ concluded respondent had failed to meet that burden. The only evidence bearing on the issue of the change in circumstances was claimant's own testimony. That testimony indicates that claimant has increased her job search efforts when compared to her conduct up to the time of the Regular Hearing. As of that time, she had only been released to return to work for approximately one month. In his Award, the ALJ noted this short period of time and elected not to penalize her for her limited efforts. He did, however, suggest that if her efforts did not improve, that there would be consequences in the event respondent elected to file a request for Review and Modification.

Since that time, she has documented her job search, showing all of the places she has sought employment. Admittedly, the list of job contacts do not contain addresses, phone numbers, dates of contact, nor the type of job sought. The ALJ noted that "[c]laimant's testimony regarding how vigorously she pursues employment is less than compelling; one suspects that if the lists are not fabrications they reflect the minimal effort needed to gin up such lists."¹⁰ He also stated that he suspected the claimant was

⁶ *Gile v. Associate Co.*, 223 Kan. 739, 741, 576 P.2d 663 (1978).

⁷ See, e.g., *Fouk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995) and *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁸ See *Morris v. Kansas City Bd of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

⁹ *Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, Syl. ¶ 4, 59 P.3d 352 (2002).

¹⁰ ALJ (Review and Modification) Award (Sept. 20, 2004) at 2.

“manipulating the system”.¹¹ Nonetheless, he noted that respondent had failed to meet its burden of proving claimant’s lack of good faith. Claimant’s testimony is uncontroverted on the issue of her efforts to find employment, the fact that she has yet to receive a job offer and that if offered one, she would accept employment. Moreover, despite respondent’s misgivings about the adequacy of her job search efforts, respondent never offered to provide claimant with vocational rehabilitation or placement assistance.

Under these facts and circumstances, the Board is unpersuaded that respondent has met its burden of proving a change of circumstances as it relates to claimant’s good faith post-injury job search. Accordingly, the ALJ’s denial of respondent’s request for Review and Modification is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated September 20, 2004, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of March, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger Fincher, Attorney for Claimant
Brenden Webb, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹¹ *Id.*